FILED
JUL 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-5731

In the Supreme Court of the United States

OCTOBER TERM, 1985

WILLIE DAVIS BROWN, a/k/a WILL BROWN, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED OCTOBER 10, 1985
CERTIORARI GRANTED JUNE 2, 1986

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RELEVANT DOCKET ENTRIES

Date	Nr.	Description of Document or Proceeding
05-08-84	71	Indictment (superseding)
06-21-84	118	Order re alleged attempt to influence selection of jurors: ptys & cnsl agreed matter should be held in confidence until jury reached a verdict; dfts reserved rt to be heard on the issue at a later date; verdict reached at 7:00 PM, Wed 6-20-84; accordingly, record on this issue now opened & the court reporter is requested to produce a transcript of such proceedings (THOMPSON) ih
06-22-84	—	Reporter's Transc of Proceedings Had on June 22, 1984, by Theresa A. White CSR
06-22-84	119	MINUTE ORDER: Ct recevied further info re matter of govt cnsl's contact w/jury clk; Ct conducted an interview on record, a transc prepared & avail; Clk directed to notify all cnsl by phone (THOMPSON) ih
09-23-85	269	Opinion fm CCA
09-23-85	270	Judgment (Affirmed) (Moore, Breitenstein & Doyle) (CCA84-2290)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Case No. Cr. 84-43-T

UNITED STATES OF AMERICA, PLAINTIFF

—*vs.*—

SAMUEL MIRON PONDER, aka SAMMIE M. PONDER, aka SAM PONDER; TERRY WAYNE HOLLEY; GREGORY DUANE HOLLEY; WILLIE DAVIS BROWN, aka WILL BROWN; DEFENDANTS

[TRANSCRIPT OF EXCERPTS OF JURY TRIAL]

TRANSCRIPT OF EXCERPTS OF JURY TRIAL HELD BEFORE THE HONORABLE RALPH G. THOMPSON, UNITED STATES DISTRICT JUDGE, ON JUNE 18 & 20, 1984, AT OKLAHOMA CITY, OKLAHOMA.

AMENDED PAGE 2

(The following proceedings held June 18, 1984)

THE COURT: This is an in-chambers conference. The date is Monday, June 18, 1984. Present are Mrs. Beatrice Ritter, the jury clerk of our Court, in addition to myself and the court reporter. I have asked Mrs. Ritter to speak with me on the record on a matter that she has already reported to me and which needs attention.

It is my desire to handle what I believe is a very sensitive matter in a way that will both preserve recollections of facts, not jeopardize the eventual full exploration of the facts in its regard, and yet not unnecessarily disrupt a significant narcotics trial now in progress.

The sensitivity of the matter is obvious from a statement that I received from the court clerk, Mr. Frank Bonsiero at the close of the day Friday, June 15th, while our trial was in progress. He reported to me that Mrs. Ritter had reported to him that Ted Richardson, the Assistant United States Attorney who is prosecuting this case, had called Mrs. Ritter during a period of time in which Mrs. Ritter was attempting to furnish us additional jurors so that we could complete the jury selection in the trial. We had exhausted all of our initial jurors, and by agreement of all parties, took a little longer noon recess so that she could acquire about fifteen additional jurors so that we could complete the primary jury and also

AMENDED PAGE 3

select three alternates. During the period in which she was engaged in that effort, it was reported to me that Mr. Richardson called her on the telephone, reached her in the clerk's office and asked her not to include any black people in the additional jurors to be furnished.

When Mr. Bonsiero furnished me that information late in the afternoon on Friday, I told him that I would give the matter careful thought over the weekend and proceed today, Monday, as appropriate. Mr. Bonsiero had assured me that Mrs. Ritter had assured him that Mr. Richardson's suggestion had not been followed; that no selective effort was made in the procuring of additional jurors on any basis; and that in short, the conversation with Mr. Richardson had not resulted in anything other than the completely routine and proper, regular handling of the jurors from her part or on anybody else's part.

This morning I personally and privately interviewed Mrs. Ritter. She stated exactly the same set of facts that Mr. Bonsiero had reported to me, and she assured me that Mr. Richardson's statement to her had not resulted in any effort on her part to honor it or follow it, and that

there was in fact no irregularity whatever in the procurement of additional jurors in our trial.

From that assurance and from knowing her and having complete confidence in her, I concluded on this date that there was no consequence to this trial, however improvident Mr. Richardson's comment to her might have been.

Having reached that conclusion, I decided that I would wait to advise the parties and counsel about it until after the jury was at least in deliberation and possibly until after they had reached their verdict.

My reason for waiting is my concern that the revelation of what has happened might very well generate substantial publicity, and I am concerned that the jury not be exposed to any unnecessary publicity, particularly of a kind that might very definitely influence them or prejudice them in one way or another in reaching their decisions in this case.

I'm equally concerned, however, that the parties and all counsel in the case have a complete and unimpaired opportunity to explore with all appropriate persons what the facts are in this case in this regard, and I intend to give them that opportunity before the record in this case is closed.

At an appropriate time, when the possible exposure to that type of publicity can be minimized or avoided, I intend to have a full, open, evidentiary hearing with Mr. Bonsiero, Mrs. Ritter, and anyone else appropriate for a full exploration of the facts, present for sworn testimony in open court with all parties and counsel present. It is my belief that handling it in this way, that this highly sensitive and important problem can be fully explored without jeopardizing a lengthy and important trial in progress.

I recognize that it is discretionary with the Trial Court as to whether to defer the evidentiary hearing in this regard until a later time or to conduct it by interrupting the course of the trial. I've given this very careful

thought and I am completely sensitive to the need for the investigation of the facts and a complete record to be made in its regard; and I have concluded that this is the balanced, fair, preferable method to use.

Having stated that as a preamble, let me proceed now with an on-the-record inquiry of Mrs. Ritter as to all of the facts of this matter as she recalls it.

First of all, you are Beatrice Ritter, our jury clerk.

THE WITNESS: Let me correct you. It's Slater.

THE COURT: I'm sorry. Slater.

THE WITNESS: Use Slater through that. I didn't interrupt you, Judge. That's fine.

THE COURT: How long have you been our jury clerk?

THE WITNESS: About five and a half years.

THE COURT: And you are the person primarily responsible for acquiring an adequate number of jurors and, when necessary, additional jurors so that all of our trials have jurors for our selection process; is that correct?

THE WITNESS: Right. That's—

THE COURT: And have done that for all the years you've been here in that capacity?

THE WITNESS: That is correct.

THE COURT: Now, you heard me summarize the information that I received, both from Mr. Bonsiero on Friday and from you—

THE WITNESS: (Nods yes)

THE COURT: —this morning, did I not?

THE WITNESS: (Nods yes)

THE COURT: Would you say that I fairly summarized the information both that you gave Mr. Bonsiero and that you gave me this morning?

THE WITNESS: I think you did a very good job.

THE COURT: Now, would you please for the benefit of anyone reading this record, and specifically for parties and counsel involved in this case and for anyone reviewing it at the appellate level, tell me exactly the facts as

they occurred and without abbreviating your statement simply because you've already told me this morning.

THE WITNESS: It was around 12:00 Thursday noon when Mrs. Higginbotham told me that you needed additional jurors. I went to the clerk's office to get my assistant to help me call them. While in there, I received this telephone call. He identified himself as Ted Richardson, and as best I remember, he said something about, "Are there any blacks on the jury?"

And it did shock me. I said, "What?"

He said, "Don't bring any blacks in," something to that effect.

And I said, "I'm going to do the best I can. I haven't even had a chance to get my feet on the ground."

And as I told you this morning, I truly had to take top priority. I had to get the jury in, and I didn't really think too much more about it at that time.

THE COURT: When you say you told him you would do your best, what do you mean by that?

THE WITNESS: I meant that I had to get jurors in, period, regardless of what color they were.

THE COURT: You were not assuring him that you would do your best to exclude blacks, then; is that right?

THE WITNESS: Number one.

THE COURT: Is that right?

THE WITNESS: Right. That's correct.

THE COURT: Your statement, if not explained, could be taken as that.

THE WITNESS: Well, correct. Really and truly, we had only qualified those jurors on Monday before, and I was really not acquainted with the names enough to know whether they were black or white, and I really still am not all of them. But anyway, I just had started calling and Judge Brett had a jury deliberating. There were six women. They came downstairs, and I said, "Go eat lunch and get back. I need you at 2:00."

THE COURT: Had they reached a decision in that case?

THE WITNESS: They had reached a decision, yes.

THE COURT: And had they been excused?

THE WITNESS: Yes. They had been excused back to me, so I sent them to lunch to be back at 2:00. There was a black in them, a black lady, and I still didn't realize this. I mean, I hadn't had time to think about it; and in calling them in, I just got people that could get in the quickest and the best way we could in the two hours that we had to work with.

There were two additional blacks, so that makes three blacks altogether that was called in. And no, I did not follow his request, order, whatever you might want to call it.

THE COURT: Was anything at all done by you or anyone else involved in this jury process to select additional jurors in this trial on the basis of race?

THE WITNESS: No, sir, there was not.

THE COURT: Was anything done that was not completely regular?

THE WITNESS: I did it the same as I'd always done it.

THE COURT: Is there anything that was done that would cause anyone to question whether there was the slightest effort made to select this jury on the basis of race, sex or any other basis?

THE WITNESS: No, sir.

THE COURT: Was it done?

THE WITNESS: Of course not.

THE COURT: Was it done completely randomly within the available jurors?

THE WITNESS: (Nods yes)

THE COURT: And routinely without any such selection effort made?

THE WITNESS: It absolutely was.

THE COURT: And may I conclude from what you've told me, that notwithstanding the impropriety of what you were asked to do, that there was in fact no consequence of that sort with regard to the selection of addi-

tional jurors from which our jury and alternates were selected.

THE WITNESS: No, there wasn't.

THE COURT: Have we now stated for the record, have you now stated for the record all of the facts bearing on this entire matter?

THE WITNESS: Yes, Your Honor, I'm quite sure there is—I mean, I have. I—As I stated, it happened when I was in a hurry and all, but I—after I got the jury called in and got settled down, as I told Mr. Richardson when he called me, I didn't even have my feet on the ground yet. I mean, the word had just gotten to me; and when I did get my feet on the ground, I began to think about what he had said; and to be quite frank about it, I was in a state of shock.

THE COURT: Did you get the impression from Mr. Richardson that he was joking with you or—

THE WITNESS: (Nods no)

THE COURT: —making some kind of a light-hearted remark or—

THE WITNESS: (Nods no)

THE COURT: —did you conclude that he called you for the purpose of seriously asking you to do what he asked you to do?

THE WITNESS: I didn't take it as a joke. If he meant it as a joke, in my opinion, it was a poor joke.

THE COURT: Well, it is such an unlikely thing to have happened.

THE WITNESS: That's right. I'll agree with you.

THE COURT: That I have to ask if—

THE WITNESS: This is true.

THE COURT: —it was done in a jocular vein or if there was anything about the way it was said that would give you any doubts about that,—

THE WITNESS: Well, I certainly—

THE COURT: —the seriousness in which he asked it.

THE WITNESS: I certainly didn't take it as a joke. I—after I, as I said, got my feet on the ground and

thought about it, I think he was in dead earnest. Maybe I'm mistaken, but I think he was.

THE COURT: Now, one of the reasons that I have hastened to have this private, on-the-record interview is so the facts, as you know them, can be as fresh on your mind when it is recorded now as they can be. Because if this case takes another two or three or four days to try, we will be that many more days removed from the event, and that is my intention here is to record the facts as they are best recalled and in as fresh a state as we can get them.

Is there anything else that happened that you can think of?

THE WITNESS: I can't think of anything right now, Judge.

THE COURT: Have we covered the entire subject matter as far as you know?

THE WITNESS: We—yes, we did. I really will—can't say word for word; but we did get, you know, the nitty-gritty of the pertinent facts of it. I, as I stated, was in a hurry and had—because I only had two hours to do this and I knew it was important, and I didn't even realize what had happened until after I got them in and got to thinking about it.

THE COURT: Once you thought about it and became concerned enough to report it to the Court and clerk, did you relate to him the same facts that you've related to me on this record?

THE WITNESS: Yes, sir.

THE COURT: And you heard me summarize at the beginning of our interview what facts he related to me.

THE WITNESS: Yes, sir.

THE COURT: And was that accurate?

THE WITNESS: He—yes, it was correct.

THE COURT: Thank you.

(Close of requested transcript of June 18, 1984 proceedings)

(Following proceedings held in Judge Thompson's chambers on June 20, 1984 at 11:05 a.m.)

THE COURT: This is an in-chambers conference with Mr. Richardson. I've asked Mr. Bill Price, the U.S. Attorney, to join him and us, and Mr. Porter and Mr. Haddad for the purpose of my sharing with them some information that I have received during the course of this trial. It is also for the purpose of my sharing with them the initial step that I took in regard to the information that I've received, and for the further purpose of offering to conduct an evidentiary hearing as may be requested by either or both of the defendants or perhaps the government in regard to what I'm about to tell you.

You will recall that in the selection of the jury, we ran out of jurors in our first group; and for the purpose of completing the jury, both primary and alternate, we took an extended noon recess and requested the jury clerks to provide additional jurors for that purpose, and she did that.

It was reported to me that during her efforts, during the noon recess, that Mr. Richardson telephoned Mrs. Bea Slater, our jury clerk, and requested that she not include any blacks in the additional number of jurors being arranged for. Mrs. Slater reported that to the court clerk, Frank Bonsiero, who in turn reported it to me, and this occurred late Monday evening. I'm sorry. Late Friday evening after the trial had recessed.

On Monday, I asked Mrs. Slater to come to my office, and I privately inquired of her about the information that I had received from Mr. Bonsiero. I made that inquiry in her presence, in the presence of the court reporter only, to determine what she had to reveal and to determine what steps I should take and when I should take them.

Mrs. Slater reported to me that during the noon recess when she was busy trying to arrange for some fifteen additional jurors at my request, that she had received a telephone call from Mr. Richardson, receiving

the call in the court clerk's office, and that Mr. Richardson had indeed said, in effect, "Do not include any blacks in these additional jurors that you're arranging for."

I asked Mrs. Slater if she did anything to honor his request or to give it effect, and she assured me that she did not, that she arranged for fifteen additional jurors without regard to any racial or other basis; and in fact, I believe three of the fifteen or one-fifth of them were in fact black.

In any event, she assured me that nothing in the jury selection process was altered by the reason of the request that she said she received from Mr. Richardson; and I recall that we did have black people among those additional jurors; and concluded, therefore, that while there was a serious allegation of prosecutorial misconduct, that it had had no consequence as far as this case is concerned, and that the selection of the jury for this trial had not been affected at all by reason of what Mr. Richardson had reportedly asked of Mrs. Slater.

In that belief and based on those indications, I elected not to disrupt the trial by acting on the problem during the course of it, mainly because I did not want any publicity surrounding this information to possibly contaminate our jurors; and I believed, because it had apparently had no consequence to our trial, that my revelation to you gentlemen and any hearing in its regard could wait until the jury was in deliberations and therefore not as exposed to any publicity that this might generate as they would at any other earlier time.

My concern is great. I want Mr. Richardson to have an opportunity to respond to the information that I have just shared with you, and I want the defendants, through their counsel, to have the opportunity, as well as Mr. Richardson, to have the opportunity of inquiring of Mrs. Slater and satisfying themselves on the matter, and I make that opportunity available to both sides.

Mrs. Slater is here, she's standing by and we can do that at any convenient time. I would suggest that if we

are to have further inquiry or an evidentiary hearing, that it should be done as promptly as possible before a verdict is reached, and I certainly want both sides to have an opportunity to be heard in this regard. But obviously it's a matter of great concern to all of us, and I conclude my remarks to you this way. You know all that I know now. Mrs. Slater is available and we'll proceed as appropriate and as requested. And I do not require Mr. Richardson to make any comment at all now unless he wants to.

MR. RICHARDSON: I do.

THE COURT: But I also want to be very clear in that I do not suggest or propose that this matter be conducted in its entirety behind closed doors in chambers. This is a highly sensitive matter. Counsel may feel that they should inquire of Mrs. Slater in regard to its possible effect on their case; and if that's requested, it should be done in open court with the defendants present so they can satisfy themselves in that regard. And I'll proceed as you gentlemen request.

MR. HADDAD: Because of challenges exercised during the initial jury selection of the initial panel and the objections raised by counsel to the exclusion of blacks both peremptorily and again, with due respect to the Court, on matters that we felt were not justiciable matters of cause, I particularly would request an evidentiary hearing, and I don't mean that to be—but I think for the preservation of the record, particularly with this occurring, which to me is somewhat overt racism in a selection of a jury with black defendants. And I think when one considers—I don't know how to—let me just review my notes, but there are some things that caused concern considered during the course of this trial that, all taken together, I think we need an evidentiary earing because some due process rights may have been violated.

THE COURT: Mr. Porter?

MR. PORTER: Well, I wasn't convinced in my own mind that an evidentiary hearing was going to be neces-

sary; but in light of what Fred has said, I would like an opportunity to confer with him and so we might be able to at least be together on whatever is to take place.

THE COURT: All right.

MR. HADDAD: I didn't mean to speak for you. That was my initial thought. I haven't had time to reflect on it even.

MR. PORTER: I understood that.

THE COURT: I think that before anyone makes a decision on anything that we should take a little recess and let all of you confer as you see fit.

MR. PORTER: Right.

THE COURT: Did you want to say something, Mr. Price?

MR. PRICE: Well, essentially I wanted to have Ted have an opportunity here first to respond because I think you all may decide, you know—And again, I don't know what the response is or whatever, but having a hearing in open court on something like this may be justified or it may be something that besmirches his reputation, too, and you all may, after hearing the explanation, decide that that is not something that should be done; and so what I'm suggesting is that I think that we first should hear the explanation, and then you all making a decision in your own heart whether this is something that should be the subject of an evidentiary hearing.

MR. PORTER: All right.

THE COURT: Let me ask everyone this first of all, or state for the record, and for your benefit: I have not revealed this with any of you. You will acknowledge that, will you not all?

MR. PROTER: Yes, sir.

MR. HADDAD: Yes, sir.

MR. RICHARDSON: Yes, sir.

MR. PRICE: Yes, sir.

THE COURT: So that everyone comes to this moment on an equal basis as far as any information is concerned.

MR. PRICE: Absolutely.

THE COURT: Would you prefer to talk with Mr. Price before commenting, Mr. Richardson?

MR. RICHARDSON: No, sir. I would like to be sworn in, and I don't need to confer with anybody about what I want to tell the Court, and I think what I have to say, we need to be on the record; and then Mr. Porter and Mr. Haddad can make their decision from there.

TED RICHARDSON

being first duly sworn, testified as follows:

THE COURT: Mr. Porter and Mr. Haddad, are you agreeable to inquiring at least initially without the presence of your clients?

MR. PORTER: Yes, sir.

THE COURT: Under these circumstances?

MR. RICHARDSON: Yes, Your Honor. I can tell you specifically, I did call Mrs. Slater. I recall at the time it was, I guess on Thursday when we were selecting the jury panel and when we had run out of jurors. There was some kind of break maybe for lunch or something like that, and some more were called in.

I called her and I specifically asked her if she knew how many blacks or anything like that, if there were any way to tell how many black people were going to be called into the subsequent number of jurors, and she said, I believe, that she didn't know; and I specifically wanted to know because that affected what the composition of the jury panel was.

I never asked Mrs. Slater not to call any black jurors. I just simply wanted to know how many, if she could tell, were in the group that were coming in.

During the voir dire or the selection process of the jury, there were some black jurors. Several were excused, as I recall, by the Court. I excused one during the regular group that we were selecting, and then in the subsequent group, I selected another. It wasn't racist on my part to excuse those particular jurors; but I think,

in all candidness, I've tried cases with Mr. Porter before, and I think he's a marvelous opponent. He's very good in everything, and he also has a very special appeal to the black people in the community.

And the one trial that I can think that we had together that actually went to trial, Judge Smith got kind of worn out with Mr. Porter and myself and said, "Men, I'm worn out with you two. I want you to take the first twelve jurors and not excuse anybody," which we did. There were six black and six white jurors on that case. It was a robbery, and it appeared to me an open and shut case. The man was caught there with the purse and the money and everything. We had a hung jury in the case, six to six, along the racial lines.

And so all I'm telling the Court is that I did take into consideration the fact that these people were black and that almost everybody—I would think they would be an incompetent juror, almost, if they were from this area and didn't know Senator Porter. And I had planned on excusing them if they indicated in any way that they either knew Melvin Porter or knew who he was.

And my request of Mrs. Slater was not in any way to get her not to call any jurors or to pick and choose among the people that, say, the government would want; but I did want to know if possible in advance who would be the—not their names, but if there was any way to know how many black jurors would be coming in the additional group because I knew at least one or two of them would be on the jury panel itself, and I don't know what else to say about that.

I would be glad to answer any questions that the Court has or that Mr. Haddad or Mr. Porter or—I thought that was Bea back there—that anybody would have.

THE COURT: Mr. Richardson, are you able to recall with specificity what you said to Mrs. Slater in that conversation?

MR. RICHARDSON: I can't repeat it verbatim, Your Honor, but I specifically remember the conversation, and

you know, I thought at the time, well, maybe I shouldn't call and even inquire; and I do specifically remember the conversation and everything that was said, yes, sir.

THE COURT: Are you sure, then, that you did not ask her to select the new group of jurors on any racial basis?

MR. RICHARDSON: I'm positive I did not ask her to select or choose anybody on any basis, but I did specifically ask her if she could say, you know, if these were black or white people, yes, sir.

THE COURT: Mr. Price, do you have any inquiry of Mr. Richardson?

MR. PRICE: There wasn't any kind of even a kidding reference in any way to—Obviously you don't have any influence over a court clerk, an Assistant U.S. Attorney doesn't, any ability to get them to do anything you want them to do. Is there any possibility that you made any kidding reference to that that she could have misinterpreted?

MR. RICHARDSON: I think that the attorneys would just have to ask Mrs. Slater. I don't think so. I—I may have said something along the lines I would sure like to know how many blacks are coming because I, you know, know simply that Senator Porter has a big influence on the black population. But in reference to anything to indicate don't call blacks or pick and choose among them or something like that or even kidding about that, there wasn't any.

MR. PRICE: Did she express to you any concern about this conversation? Did she say that what you're doing—

MR. RICHARDSON: No, she didn't.

THE COURT: You're telling me to do something I shouldn't do or something like that?

MR. RICHARDSON: No. She just said, "Ted, this is who we're calling from and I'm trying to get the people in right now."

MR. PRICE: And it was just a few second conversation or was there anything beyond that that you recall?

MR. RICHARDSON: You'd just have to ask Mrs. Slater, really, about that. I don't think it was more than maybe, maybe two minutes. I don't know. It was a very brief conversation. That's all I know.

THE COURT: What was your purpose in asking for a numerical breakdown of blacks versus others in the additional jurors to be called?

MR. RICHARDSON: Well, I didn't really ask for a numerical rating. I just asked her if there was any way she could tell whether or not the people she was calling were black or white. And my purpose, I think, was like I just said, was to see, you know, if there were going to be either a lot or any or none at all of black people.

THE COURT: Yes.

MR. HADDAD: You're an officer of this Court; there is no question about that.

MR. RICHARDSON: Yes, sir.

MR. HADDAD: And your job as prosecutor is to provide defendants a fair trial; not only get a conviction. Do you agree with that?

MR. RICHARDSON: Sure.

MR. HADDAD: And would you agree you were out of peremptory challenges at the time the new panel was called, as were the defendants?

MR. RICHARDSON: We would have to check the record on that.

MR. HADDAD: Or you had one left.

MR. RICHARDSON: I was under the impression I had one left, but I'm not positive on that.

MR. HADDAD: You may have been out or had one challenge left.

MR. RICHARDSON: Yes, sir.

MR. HADDAD: And of the three black called, my recollection there were three; two were excused by the Court. Would that be fair, for cause, in the initial panel? Two were excused by the Court for cause; would that be correct?

MR. RICHARDSON: I don't know. I know that I excused one on my peremptories, and there were no other black people on the panel.

MR. HADDAD: Would you agree that after the rather extensive voir dire that the Judge conducted on all jurors, that that black juror that you exercised your peremptory challenge on had stated that she could be fair, she would not be influenced by the fact of Senator Porter and so forth?

MR. RICHARDSON: Yes, sir, that's correct.

MR. HADDAD: Okay. And would it be a fair statement and it may be that this question is so basic as to sound absurd, if you were out of—if you had one challenge left and a black were called and you exercised that challenge peremptorily and another black were called, you would be out of challenges.

MR. RICHARDSON: Yes, sir.

MR. HADDAD: And you would admit, would you not, that the evidence that at least perhaps not coming out at trial but through the discovery was such that these black defendants were selling dope to white people, according to Mustin. Mr. Ponder would sell his dope mainly to white people.

MR. RICHARDSON: No, I don't think that was the evidence at all.

MR. HADDAD: I said not what came out in trial. Would you agree that the statements of Mr. Mustin in this trial pursuant to discovery furnished by you as a result of the investigation conducted by Agent Linas—I can't say his last name—was such that the evidence would have been, had that testimony came out, that pursuant to those statements that Mr. Mustin made, Mr. Porter was selling his dope mainly to white people and keeping a large percentage of profits.

MR. PORTER: Ponder.

MR. HADDAD: Ponder, I'm sorry. Would you agree that those statements were made and that was in the discovery?

MR. RICHARDSON: How embarrassing. I haven't even reviewed those statements that Mustin made to the FBI. I do know that there was some statement somewhere that Mike Mustin said Sam Ponder sold his drugs to white people.

MR. HADDAD: And also Gregory Holley?

MR. RICHARDSON: If you say so, I assume that's correct.

MR. HADDAD: Okay.

MR. RICHARDSON: Can I—Oh. I just want to say one other thing before I forget it, if I can. I want the record to be perfectly clear that I have no objection whatsoever to black people being on this trial or any other trial, and I think the record is very clear that I do not excuse many black people ever. I like to excuse them when Senator Porter is the opposing attorney.

MR. HADDAD: So you would agree, then, pursuant to your statements, that because of a trial experience you had, you feel a black lawyer of Mr. Porter's stature representing black defendants denies you what you think is a fair trial?

MR. RICHARDSON: I just think that Senator Porter has a very, very influential effect on jurors that are black.

MR. HADDAD: Do you want me to have the question read back?

MR. RICHARDSON: What was your question?

MR. HADDAD: Could you read it back, please?

(Reporter read pending question)

MR. RICHARDSON: That's hard to answer. I just can't answer it yes or no.

MR. PRICE: I would imagine that Senator Porter, when he is trying cases in Muskogee, Oklahoma against Gene Stipe would tend to dismiss people from McAlestar. Let me just give that analogy to you. I imagine if you were trying a civil case in Muskogee, Oklahoma, and Senator Gene Stipe has such a tremendous reputation and consideration in places like McAlester, Oklahoma, you'd

have a tendency to dismiss people that from McAlester area that came up in a Muskogee Federal Court jury.

What I'm saying is, that let's face it, you may not be talking about race here. You may be talking about you're a state senator that represents basically the entire black community of Oklahoma City, highly respected, highly well-thought-of, and have probably about ninety-eight percent name recognition and probably about something similar to that in terms of the respect of that whole area of Oklahoma City.

I just think in fairness to Ted Richardson, that think of that thought would come to your mind. I imagine that that would be something that would be going through your mind if you were trying a case in places like Muskogee in the same way.

MR. PORTER: Well, the only thing, that I've tried many jury cases, both civil and criminal, where black citizens even from Oklahoma City have been on the jury and I have not—I wish that—I wish that that were always true. I've probably lost as many with black citizens on the jury that I've won.

It's a very difficult thing, you know. I'm not a ninety-eight percent hero, particularly in the minds of some blacks; and I suspect that's obvious by the mere fact that in the twenty-one years I've been in the senate, I have had opposition from the black community every time but one, so I'm certainly not politically that much of a hero.

Again, before I take any position on this—And I understand Ted's right and I think he has a very fundamental right to respond to it if he wanted to prior to any fixed opinions being developed. Again, seeing that it's been laid out, he's responded, and I would certainly like to have an opportunity to I guess confer with co-counsel and see how it would be best to approach this matter. I for one—

MR. HADDAD: I have one last question, but I guess—

THE COURT: Let's let Mr. Porter finish.

MR. HADDAD: Okay.

MR. PORTER: It is a delicate matter, and it's just something that I suspect that I would want a little time to visit with Fred on to see if we could not at least be in agreement on whatever was going to take place.

MR. HADDAD: I hadn't finished. I had one more question when Bill interrupted me.

MR. PRICE: I'm sorry.

MR. HADDAD: That's okay. Would you agree that had either myself or Mr. Porter went to the jury clerk and requested, if that be what happened, that all black people be called, that that would be a commission of attempted obstruction of justice?

MR. RICHARDSON: I would think it would be very improper.

MR. HADDAD: Would you agree it would be attempted obstruction of justice by invading the jury process or attempting to so do?

MR. RICHARDSON: I hate to sound so ignorant. I don't know exactly what it would be.

MR. HADDAD: Okay.

MR. RICHARDSON: I just think it would be very improper if you all asked Bea only to call black jurors.

MR. HADDAD: Okay.

THE COURT: Let me suggest, before we take a break and let everyone confer, that the alternatives as I see it are as follows. Number one, Mrs. Bea Slater, the jury clerk, is available for inquiry in chambers or otherwise in an evidentiary hearing in the courtroom, and she will remain available to us and we'll proceed as appropriate after you've conferred.

The inquiry that I made of Bea Slater on Monday was on the record. The time has not permitted a transcript to be typed of that, but I will be glad to share and I have attempted to share with you what she told me. And I will tell you further that, and you will see this when you see the transcript of what her answers were, that she felt

rushed, as she certainly should have because she was asked to get fifteen additional jurors very quickly so she didn't delay our trial. That her memory was not specific as to the words said, and in fact she did not promptly report it to the court clerk and did so only upon reflection in feeling that it was something, upon reflection, that she should report. So the words as related to me by Mrs. Slater and the account of the conversation by Mr. Richardson are inconsistent, and I suggest that Mrs. Slater should be inquired of for your satisfaction, but we can do that in any form that you feel is appropriate.

But why don't we take a few minutes and let all of you confer, and then I'm available to you when you're ready to reconvene.

(Following proceedings held in Judge Thompson's chambers at 12:15 p.m. on June 20, 1984)

THE COURT: After having the opportunity to confer, defense counsel now have suggested and it is agreeable with everyone that the court reporter will read to all counsel the record of the inquiry that I made of Mrs. Bea Slater on Monday of this week, and all are further in agreement that my presence is not necessary for that to be done, and then we'll reconvene and proceed after they have had the benefit of hearing that record.

MR. HADDAD: The Court's going to lunch; right?

THE COURT: Yes. Now.

MR. HADDAD: Okay. I was going to say you said to reconvene about 1:30. Maybe I'll grab a sandwich, too, and make some phone calls.

THE COURT: Do you want to have it read to you now?

MR. HADDAD: Yeah, but I'm saying you said we would reconvene and it was at 1:30.

THE COURT: Yes. 1:30 is agreeable to me if it's agreeable to you.

(Court reporter read entire in-chambers conference which was held on Monday, June 20, 1984)

(Following proceedings held in Judge Thompson's chambers at 1:30 p.m. on June 19, 1984)

THE COURT: Gentlemen, you have now had read back to you my inquiry of Mrs. Bea Slater that I conducted on Monday, have you not?

MR. PORTER: Yes, sir.

MR. HADDAD: Yes.

MR. PRICE: Yes.

THE COURT: You've also had the opportunity to consult among yourselves and with each other.

MR. PORTER: Yes, sir.

MR. HADDAD: I think we need a hearing.

MR. PRICE: Let me inquire. Can we have the hearing initially here in chambers?

MR. HADDAD: Yes, sir.

MR. PRICE: With Bea Slater?

THE COURT: With Ms. Slater.

MR. HADDAD: Yes. And Mr. Bonsiero.

THE COURT: Bonsiero is the court clerk, whose role in this, I might add, was to report to me what his subordinate Mrs. Slater had reported to him.

MR. HADDAD: Uh-huh.

THE COURT: And they are both available, and we can take them in any order of your choosing.

MR. PRICE: I don't know.

MR. HADDAD: Take the gentleman first, I guess, and the lady second.

MR. PRICE: Of course, really what he's just saying is the hearsay recitation.

MR. HADDAD: It's only a hearing. Hearsay can come in. I'd like to have him here.

THE COURT: Is that agreeable? I'll call for him first.

MR. PRICE: That's fine.

THE COURT: And then we'll have her come down.

MR. HADDAD: My clients would like to attend, if that's all right with the Court.

THE COURT: I'm not going to exclude them, but I suggest we relocate in the library.

MR. HADDAD: Okay.

THE COURT: And of course, that means we'll have to have the marshals present as well, so we'll make those arrangements.

(Following proceedings held in Judge Thompson's library at 2:00 p.m. on June 19, 1984)

THE COURT: We are meeting in chambers with both defendants personally present, with each of their counsel, with Mr. Richardson and Mr. Price, and with the deputies assigned to the trial, together with myself and the court reporter. And we are meeting for the purpose of making Mr. Bonsiero available to answer any questions regarding what he knows about the issue in question.

And I might, as a starting point, recite that after the trial had recessed for the weekend on last Friday afternoon, Mr. Bonsiero asked to see me, came to my office and related to me information given him by Mrs. Bea Slater, the jury clerk. And Mr. Bonsiero's information to me, I have already given on the record here, so I won't burden the record by further describing it, particularly since he's here to give that answer personally.

But as an opening inquiry, did you come to my office about 5:00 after the trial had recessed last Friday, upon receipt of Mrs. Slater's report to you that she had received a call from Mr. Richardson, and is that not so?

MR. BONSIERO: Yes, sir, it's true.

THE COURT: Now, for the benefit of everyone here and for the benefit of the record, would you as closely as you can recall it, state all the facts, starting with your first contact from Mrs. Slater and then through the conclusion of our conversation.

MR. HADDAD: Excuse me, Your Honor. I don't know, but for purposes of the record, does he need to be under oath?

THE COURT: I think it perhaps would be better. So would you raise your right hand and be sworn.

MR. HADDAD: Thank you, Your Honor.

FRANCIS C. BONSIERO

being first duty sworn, was examined and testified as follows:

THE WITNESS: At about as near as I can recall, about 4:00 on Friday afternoon, Bea Slater came into my office, my jury clerk, and she was obviously distraught, and she said, "I have something to tell you."

I said, "Well, by all means, please do."

And she said, "You know about the Thompson trial that they are having down there today."

And I said, "Yeah. I know of it."

She said, "Well, we tried to get a jury yesterday." I think she said that we sent down, originally sent down thirty jurors and they couldn't get a jury panel—or couldn't get the twelve and the alternates selected.

"So I was under orders from Irene, who is under orders from Judge Thompson to get—call in additional juries—jurors."

And this was some time around, oh, I would say, 11:45 on Thursday that she got notification that she would need more jurors. So she was scrambling like the dickens to get the additional jurors, and about noon she told me she got a call. This is Thursday still. At noon she got a call from a person who identified himself as Ted Richardson, and she said that Ted said, "Bea"—Let me recall this now. Said, "Bea, uh, we'd like not"—words to the effect that, "Uh, we'd like to have as few blacks as possible on this jury."

And Bea made the statement that, "Ted, I'm just scrambling like hell to get what I can, and I just have to get however many jurors however possible I can get them," as if to—you know, not to give any—the statement not accommodating the request.

So I asked Bea, I said, "Now, Bea that could be, you know, there could be some difficulty in his request." I said, "Are you sure that's what he asked?

And she said, "Yeah. He said he would like to have—not for us not to get any blacks."

And I said, "Well," again she asked me, displaying her anxiety over this. "Do you think we have to do anything about this?"

And I said, "You're damn right." I said, "We can't sit on this. This thing may be bigger than both of us. I'm going to have to go to the Trial Judge on this." Or I may have said, "I'm going to have to go to the Chief Judge," but I had second thoughts on that and I said, "I'm going to have to go to the Trial Judge on this."

And again, this was around 4:00 in the afternoon and I came down here immediately with the intent of seeing you, but I knew that you were in Court; and therefore, I left word with Sharon and said, "I absolutely have to see Judge Thompson before he leaves today."

At 5:00 you called me or she called me, and I related the story to you in chambers.

THE COURT: Okay. Who wants to make first inquiry?

MR. PRICE: Why don't you all.

MR. HADDAD: Okay.

DIRECT EXAMINATION

BY MR. HADDAD:

Q Did Mrs. Slater appear that she could have been misinterpreting what Mr. Richardson had said?

A I asked her a couple different times, "Now, are you sure this is what he said?"

She said, "Frank, you know, I was in—running around just trying to get as many jurors as possible, but I'm—I feel certain that that was the request, that, you know, he had asked to—not to get any blacks on the jury."

Q All right. And to your knowledge, has a U.S. Attorney or an Assistant U.S. Attorney ever called your office in any regard relative to the make up or composure of prospective juror panels?

A That's the first time that that came to my attention, anything that type—that type of incident.

Q And how long have you been the clerk?

A I have been acting clerk—I've been clerk since May and acting clerk since November of last year.

Q Okay. Now, did you inquire of Mrs. Slater why she waited a day to tell you?

A I was a little bit concerned about that, yes. She was—she really didn't know. I suppose she had a tiger by the tail and she didn't know what to do with it. As a matter of fact, she went home that evening, and she related this story to me, and her husband said, "Now, look. You have to tell your boss, and if you don't tell him, I will."

And you know, so she did come to me the next day. But she just—I think she wanted to, which I would suspect would be anyone's natural, their first response to it is perhaps to avoid a somewhat thorny problem.

Q So that—

A Now, I'm just—This is me talking. This isn't her.

Q I understand that. I'm not trying to put words in your mouth at all.

A Okay.

Q What I'm trying to get is she related to you that she was in essence troubled by this and related what happened with her husband.

A Well, she related the incident to her husband, and her husband said, "Now, look." You know, he saw perhaps the seriousness of it all, and he said, "You're going to have to go tell your boss," so—

Q So that at least at any rate, your way of thinking, she knew what she had heard in her own mind.

A Oh, yes.

Q Or else she wouldn't have related it.

A Oh, yeah, there is no question about it. No question about it.

MR. HADDAD: I have nothing else.

THE COURT: Mr. Porter?

MR. PRICE: Frank, let me.

THE COURT: Mr. Porter, did you wish—

MR. PORTER: No, sir.

THE COURT: Go ahead, Mr. Price.

MR. PRICE: I'm sorry.

CROSS-EXAMINATION

BY MR. PRICE:

Q At the time she talked to you was what time the next day?

A I'm going to have to say it was somewhere around —between 3:30 and 4:00.

Q Of the day after the incident?

A Yes. She came and sought me out on Friday afternoon, 3:30 or 4:00.

Q You relate basically that she said to you, "We would like as few blacks as possible on the jury panel."

A I'm paraphrasing the—

Q That's what it sounded like she was saying that Ted Richardson said to her; is that correct? Is that your understanding?

A I think. I—I think—Yes, and I think the more accurate quote was, "Don't get any blacks on the jury," or, "Don't get any black jurors."

Q The way you first related it was, you know, "We would like as few blacks as possible on the jury panel," and I, at least in listening to you, I was interpreting you saying that that's what Ted Richardson told to her and she interpreted that as meaning, and it would be very interpretable as meaning, "Don't put any blacks on the jury."

A All right.

Q Could it have been either way, the way it was related to you, could it have been that she was saying to

you that, "Ted Richardson said we would like as few blacks as possible on the jury panel, and I feel he's asking me not to put blacks on the jury panel." Is that certainly consistent with what you heard?

A Yeah.

Q Or it could be either way?

A But she has told me since that time, when we've talked about it—Okay, she and I have talked about it, that the question or the statement was, "Don't get any blacks on the jury."

Q Okay.

A That was—that was the one thing that I picked up on. That was the one statement.

Q Did you ask her, did you quiz her about this? In other words, did this affect her at all in the way she carried herself out in doing the jury?

A Absolutely not. As a matter of fact, as a matter of actual fact, I think the—after the lunch break, when they went back into Judge Thompson's court, I think of the—however many jurors there were, there was at least one black there.

Q The U.S. Attorney's office has no ability to order anybody to do anything like you're talking about. I mean, we've never tried to do that.

A I'm—

Q And we would have no—we have no—

A I'm certainly aware of that. I don't dispute that.

Q Again, we'll have to ask her whether it would have been misinterpreted. This was a phone call, as you understood it.

A It was a phone call, and in fact I wasn't there, but the phone right outside of my office where my secretary sits, and around that time, if I can recollect what Bea said to me, she said everything—she was, as I said, scrambling to get juries jurors, and people were at the counter; and she took this phone call right at that desk.

Q Did you ask whether she questioned him about, you know, "What are you talking about," or, "What are

you asking me to do," to make sure—you know, "I can't do that," or anything like that? Did you—

A She said—her response to that was, and now at what particular time it was, I don't remember. But her response to the entire statement was, "I'm just getting my feet on the ground, Ted, and I've got to get the jurors from wherever I can." Again, paraphrasing but that's—

Q It wasn't any response like, "You're asking me to do something improper," or anything like that that would normally alert someone that was the—

A To my knowledge, no, there was no response like that that she gave.

MR. PRICE: Ted?

MR. RICHARDSON: No.

MR. HADDAD: May I ask one more question?

THE COURT: Yes.

RECROSS-EXAMINATION

BY MR. HADDAD:

Q Sir, I don't know how it works here. Would it be fair to say that Mrs. Slater, the deputy clerk, selects the jurors, who would be called in, by looking at her cards or getting cards and calling certain people?

A She does—She's given an order by the—well, let me say this. She consults with the courtroom deputy. In this case the courtroom deputy for Judge Thompson. She'll consult with any courtroom deputy, and the most pressing question is how many jurors do we need? Okay. And she'll call them in, irrespective of whatever.

Q I understand that. But what I'm asking you is if one were—And I'm not suggesting in the slightest that your clerk's office would ever do that, if one desired to exclude blacks from a potential panel of jurors, they could do that, could they not? Let's say that you were given an order to call in, out of the forty or fifty cards, you had to call on ten jurors, you could assure it would be a white jury, could you not?

A I suppose you could, only if you knew. We qualify a jury twelve times a year, once a month, okay? And if you knew of that—of the racial makeup on that very first day, you could; but without that information, you couldn't. It would be impossible.

RECROSS-EXAMINATION

BY MR. PRICE:

Q In the position she was in, Frank, at this time, it would be totally impossible for her to really know that. You would not be able to remit—you know, if she was being called to do this, how would she know at that point? All she would have is all the names of the people to be called. Is that basically where she would be at at that time?

A Although she would have the advantages I described here, she might know, being familiar and working with the jurors in this case if they were empaneled—I think they were empaneled on last Monday. She might know, you know, who is black and who is white.

Q Conceiveably?

A Conceiveably, yes. Yes.

Q But let me ask additionally. They just call the entire, as I understand it, when they get a call to call the number of jurors, what's the procedure? Is it just called at random? You pick out the jurors to come up next at random or how do they do that? I'm sorry. I still don't quite understand you.

A Well, what they will do is she'll try not to call a juror who—obviously, she can't call a juror who is at that time sitting on a trial. And she'll try and make every attempt, at least this is my understanding, she'll make every attempt to call jurors who have not sat on a trial yet.

Q So she just sits down and calls as many of the jurors that have not been called upon the previous time?

A Under normal circumstances, when she has enough time. However, in a case like this, and this is not a very atypical case. It happens occasionally. She'll get requests like this where she only has an hour or two to get people in here. Part of the makeup of the second jury that was called in, six of them were coming down off of the elevator. They had just been released by I believe Judge Brett or Judge West. I think it was Judge Brett. Had just been released by Judge Brett, so she got those six and I think she needed fifteen. So subsequently she would have had to have called in nine more.

Q You're talking about the jury clerk also would have to remember the names, much less the racial background of literally how many people? Maybe sixty or a hundred people?

A Exactly, yes. It would be a hard chore. There is no question about it.

Q It would be close to an impossibility?

A It certainly would.

Q So what was alleged to have been requested would have been, like I said, close to an impossibility. It would require a photographic memory and someone that had that kind of recollection of a huge number of people that that are coming in all the time.

A Conceiveably, yes. Yes.

MR. PORTER: I have one question.

REDIRECT EXAMINATION

BY MR. PORTER:

Q Let's say that she had to call in fifteen additional jurors and let's say that if she had to call those jurors and they were not in the building, then I take it that she has a phone and an address of each juror; is that right?

A Yes, sir.

Q And so if a juror lived in the northeast section of Oklahoma City, say a typical address, 2116 Northeast

18th, one could very easily say in all probability that is a black citizen if that is the northeast quadrant where the greater segment of the black population lives. That could be a possibility; is that not right?

A I suppose if a person is aware of the makeup.

Q Of the geographical—

A Yes.

Q And if one was conscientious about names that are common to blacks as opposed to other ethnic groups, to some extent, that would be a possibility that I can identify a person by name.

A I agree, but here again, you're talking about a jury clerk that's just—

Q Yes.

A Just concerned about meeting the demands of the Judge.

Q I understand. What I'm saying, let's say if she had honored his request and said, "I'm going to try to eliminate any blacks," then that would have been a possibility of eliminating somebody who might have been black, at least by name or by geographical area where they live.

A I suppose that—It could be.

MR. HADDAD: Can I follow that up?

REDIRECT EXAMINATION

BY MR. HADDAD:

Q And also, certain people, i.e., coming off of the other judge's trial, she could have kept those that were white and sent home those that were black.

A (Nods yes)

Q I mean, yes or no?

A Yes.

Q Okay.

A Yes.

THE COURT: Now, Mr. Bonsiero, if there are no other questions, let me conclude with these questions of you.

Was there anything at all said to you by Mrs. Slater or coming to your knowledge otherwise that suggests that there was any effort intended or made to select those additional jurors on the basis of race or otherwise?

THE WITNESS: No, sir. I'm personablly convinced that she got those jurors in here without any thought to that, Your Honor. That she just got them in, whoever she could get in here without—

THE COURT: We have two areas of concern here. One is the possibility of an improper contact by an Assistant U.S. Attorney with the jury clerk in its own right. Another question and concern is whether that contact had any effect or had any consequence on the makeup of the jury in this trial.

THE WITNESS: (Nods yes)

THE COURT: On the basis of my conversation with you on Friday and my conversation with Mrs. Slater on the following Monday, I concluded that all indications were that while an improvident contact may have been made and certainly required investigation, that there was no indication that that request had any effect whatever on the makeup of the jury in this trial. Am I correct in that?

THE WITNESS: Yes, sir.

THE COURT: Any other questions?

MR. PORTER: Yes. Judge for the record, I think you're absolutely correct because as I remember there were approximately 125 jurors; and of that makeup, I distinctly remember not one but three of those jurors being black.

THE COURT: Yes. I recall it that way, also.

MR. PORTER: Yes, sir.

THE COURT: All right. Thank you very much, and would you ask Mrs. Slater to come down to the hearing.

THE WITNESS: Yes, sir.

THE COURT: Just keep your seats.

(Recess held)

THE COURT: Gentlemen, this is Mrs. Beatrice Slater, our jury clerk. Mrs. Slater, would you stand, raise your right hand and be sworn.

I think the record is complete enough at this point that any preamble or preliminary comments are unnecessary, except to explain to you, Mrs. Slater, that we are all interested and concerned about the information that you related to Mr. Bonsiero initially and then at my request related to me regarding a telephone call from Mr. Richardson. The purpose of this hearing is for all parties and their counsel to have an opportunity to inquire of you about that. And I think that's enough said, and I'll invite counsel to inquire.

BEATRICE SLATER

being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HADDAD:

Q We have had the benefit of hearing Ms. White read back your testimony that was recorded before the Honorable Judge Thompson, and let me ask you this. Can you relate again as best you can recall the circumstances and the phone calls?

A Well, I was asked, it was right around 12:00 noon when Judge Thompson recessed to get more jurors, and his courtroom deputy Irene Higginbotham came into my office and said that he needed about fifteen by 2:00 which gave me about two hours. I immediately ran into the clerk's office to get my assistant and I found out she had gone to lunch. The phone rang, they said, "Bea, telephone."

Q Okay. Now, excuse me. Somebody answered the phone other than yourself?

A Yes. Yes, sir. They answered the phone and apparently he asked for me and they said, "Bea, telephone." I took the—

Q Can I just stop you there one second. I don't mean to be interrupting you. Were you told then who was calling?

A No, I was not.

Q Okay.

A I answered the phone. I picked up the phone at—it was at Kathy's desk right outside of Mr. Bonsiero's office, and I suppose I said, "This is Bea." I usually do. Or, "This is the jury clerk," whatever, and he identified himself as Ted Richardson and said, "Are there any blacks on the jury?"

And as I remember, it shocked me. I think I said, "What?"

He said, "Don't get any blacks in," or something to that effect.

Actually at that point my mind was on getting jurors in here in two hours, and I think I answered him to the point as, "Well, I'll do what I can. I've got two hours to do this in," or more or less, you know, whatever.

And I went back to my office and started to calling. And just about that time, Judge Brett's jury had reached a verdict and I sent the ladies to lunch and I told them to be back by 2:00. There was six ladies on that jury. One of them was black and she came back.

Q How about the other six men on the jury—It is a six-man jury?

A Six women.

Q I mean, but a six-person jury.

A Yes, uh-huh. Yes, uh-huh. It was a civil case.

Q Okay. All right. Now, the first word you heard from him, Mr. Richardson, "Are there any blacks on that jury?"

A He identified hisself and said, yes—I mean, yes, this is what he said. "Are there any blacks on the jury," or something to that effect.

Q And his next words were, "Don't get any blacks."

A "Don't get any blacks in on it."

Q Are you positive of that?

A I cannot be positive word for word, but it was—that was the nitty-gritty of it. I repeat: Judge Thompson had issued an order for fifteen jurors in two hours, and that means call them and get them in in two hours, and that's where sort of my mind had blocked out.

Q Was there any doubt in your mind that what he was telling you was that he didn't want blacks on the jury?

A That's the impression I got. I don't take it as a threat. I take it as a request or something.

MR. RICHARDSON: I'm sorry. I just didn't hear the tail end of it.

MR. HADDAD: Took it as a request.

MR. RICHARDSON: A request.

Q (By Mr. Haddad) Now, could the words have been, "How many blacks are on that jury," the first words?

A I don't know. Now, as I remember it, he said, "Are there any blacks?"

Q Okay. But the second—

A And I suppose he meant, straightening my mind out since then, I suppose he meant—Well, on Monday before, we had qualified over a hundred jurors, and this bunch of jurors come out of that pool.

Q And the second thing he said was he didn't want any blacks on that jury.

A "Don't get any in on the jury."

Q There is no doubt in your mind about that part.

A Well, if it's not word for word, it's what he—what I took that he meant.

MR. HADDAD: Okay. I don't have any. Do you, Mr. Porter?

MR. PORTER: No.

THE COURT: Mr. Price or Mr. Richardson?

MR. RICHARDSON: Well, is it okay if I ask you a few questions?

THE COURT: Of course.

CROSS-EXAMINATION

BY MR. RICHARDSON:

Q Mrs. Slater, of course I'm Ted Richardson and I know that it's probably uncomfortable, and I am the person, obviously, when you say I identified myself that was calling, that was me. I think that was clear, and I just want to touch base with you.

As I understood your testimony, that when I called, I identified myself and said either Bea or Miss Slater, are there any blacks on the jury, or can you tell me how many blacks are going to be jurors? Is that correct?

A I—if I remember right, you said, "Are there any blacks on the jury?"

Q And I think my question is: I wasn't even aware that there was a jury going on. I mean, I obviously knew that you had been requested to call in some other jurors, and so would there be any problem with the idea being that my question referred to not any particular jury from Judge West or Judge Brett, but just were there any black jurors there?

A I can't—

Q Or that you were calling.

A I can't answer that. I mean, I got the call and as I repeat and have said many times, my mind was—Well, in my job you definitely have to take priorities, and Judge Thompson had issued an order for fifteen jurors and that's where my mind was locked, and I assume that's what you were talking about.

Q Okay. And then, I think that when Mr. Bonsiero testified just a few moments ago, he said that as he recalled it, that you related that I said something along the lines, "We would like to have as few black jurors as possible in this trial involving Mr. Brown and Mr. Porter." Does that kind of ring true?

A Well, what I remember your saying was, "Don't get any blacks on this jury."

Q Okay. Well—

A Now, I could be wrong in a few words on this because, again, my mind was locked on this—well, fifteen—or two hours is not very long to get fifteen people, to call them and get them in here, locate them and get them in here. No offense, Judge Thompson, but I mean, you understand.

Q Yes, ma'am.

A And that's where my mind was locked because I realized that they need to move the trial on.

Q Yes, ma'am. I think that comes down to the whole point of the hearing. Is that what you were interpreting I was saying or are you saying to the Court, and I think that is the exact issue that is very much a concern to the Court, if I said to you, it seems to me totally improper and totally the type of thing that you would get fired or go to jail on if I said to you, "Don't get any black jurors."

A Well—

Q And my question is, are you telling the Judge what I said or that's what you interpreted what I said, "Are there any black jurors on the jury panel," or when I said in reference to the trial of these men, "We would like to have as few black jurors as possible."

A Well, as I remember it, you said, "Don't get any black jurors, blacks on this jury," or something to that effect. "Don't get any blacks on this jury."

Q Or something to that effect?

A Something to that effect. And like I say, you were the attorney in there and my mind just locked on that case. Maybe I was mistaken, but that's where my mind locked.

MR. RICHARDSON: Judge, that's all I've got.

THE COURT: Mr. Price?

CROSS-EXAMINATION

BY MR. PRICE:

Q Bea, obviously it would, being in your position, you know, even if you interpreted the remarks as being any

reference to the calling of jurors whatsoever, it would be your responsibility obviously to bring it to somebody's attention, as you did.

But as I understand what you just said, there was basically a difference in this thing between two statements, and they are not really far apart and we're trying to get at the sureness, the truth one way or the other, what Ted Richardson says he did. And it's probably something that shouldn't be done, but it's of a totally different character than the other conduct. Is that he basically said, "We would like as few blacks on the jury panel as possible," and that, "How many black jurors are there," or something to that effect.

A Well—

Q That could be very easily interpreted as told are there—it being interpreted as "Don't put any blacks on the jury," as such. What I'm trying to do—but that's a very critical difference because it means whether he's doing a criminal type of thing or not. You're saying you're not sure whether it was that strong or not; is that what you're saying here?

A I definitely remember that he said how many blacks —or, "Are there any blacks on the jury?"

Q So without any doubt, you're sure of that; right?

A Yes.

Q And—

A He identified hisself and said that.

Q We all agree a hundred percent on that.

A And the next thing that you are asking me, I remember his saying, "Don't get any blacks in on this jury."

Q Could it have been very possible, and you're talking about a phone call and you're talking about a busy office and you're talking about—is it very possible, and it sounds like from the way you're expressing it, that his version of, "We would like as few blacks as possible on the jury panel," is it possible that that was what was said?

A I don't remember it that way.

Q Let me ask you. Is there a real possibility that that could have been what was said?

A I suppose it's possible, but I don't remember it that way. I remember him saying, "Don't get any blacks on this jury." It's possible he could have said it the other way, but I don't remember it that way.

Q That last remark, as I said, could be interpreted the other way, too, couldn't it?

A Yes. It could be but—

Q Yes. Did you ask him to clarify? In other words—

A No, I didn't.

Q In other words, or say some kind of words that would indicate to him that it was being interpreted in that fashion? In other words, was there some statement from him that—I mean from you that, "I can't do that. That's wrong," or something like that?

A No, I did not. I do not remember saying that, Mr. Price. What I mostly remember saying is something about I had to do the best I could. I didn't even have my feet on the ground yet, meaning that Judge Thompson had just issued the order, I had two hours to do it and I had to get to work; and the fact of the matter is when you're—I was going to get anywho I could. You know what I mean. I just—I had to get a jury in.

Q So you weren't able to really confront him with the phrase that—I mean with the thing and clarify it one way or the other.

A No, sir. I didn't take time. I got off of the phone so I could get to work.

Q If you had felt totally certain that he was saying, you know, "I'm calling down to order you to"—An assistant can't order you anyway, but, "I'm calling down to order you to keep blacks off this jury," if you felt totally certain of that, a hundred percent that that's exactly what he means, not, "My goodness, that seems like what he was asking me to do," wouldn't you have been immediately inclined to go immediately to Frank Bonsiero?

A I probably would have, but I didn't get it that way. What I—the way I took it, that he was more or less asking a favor. It was not a command or an order. It was a—a favor. That's—Well, actually, when I got this jury in, to be quite frank about it, I didn't think about it anymore because I was calling people, I was working, and I finally went to lunch at 2:30 and that's when I really realized what had happened. And I guess I was in a state of shock because it pondered around in my mind for about 24 hours, and Friday afternoon I felt like I should go in and report it, and that's when I told Mr. Bonsiero.

Q And again, I'm not saying there is anything wrong. It's right in reporting it, regardless of whether you're positive about something like that or not, but in your statement before, you made these statements: "You can't be positive. I could be wrong," and it's real critical that it—Is it certainly you could be wrong and you can't be totally positive that he said precisely those kinds of words, "Don't put any blacks on the jury."

A I—That is what I remember his saying.

Q That is what you were making reference to, "I can't be positive and I could be wrong."

A Well, in a situation like that, the only thing I can do is tell it as near as I can remember it because, again, my mind was on what I should be doing.

Q And so therefore, because your mind was on these other things, you really can't be a hundred percent sure.

A No, I couldn't be a hundred percent sure, but that's the way I remembered.

MR. HADDAD: May I?

THE COURT: Yes.

REDIRECT EXAMINATION

BY MR. HADDAD:

Q The words were of sufficient import to you that when it dawned on you what he said, you were shocked by it.

A Yes, I was.

Q Okay. And there is no question in your mind that he was asking you a favor to keep blacks off that jury.

A That is the way I took it.

Q Okay. And how long have you been working here at the U.S. Courthouse?

A I've had this job about five and a half years.

Q Has anybody ever called you up in the five and a half years you've been in here to do a favor like that?

A I can't remember it.

Q It would stick out in your mind again if it happened; correct?

A Yes, it would

Q All right. Now, do you know how many blacks were qualified to be called in and serve as jurors?

A This time?

Q Yeah.

A No, I don't. Out of the fifteen we got in, there was three in it.

Q And were they called in—one was already on Judge Brett's jury.

A One was on Judge Brett's, and then I called two in.

Q Okay.

A And to be quite frank about that, I did not even know—realize that because let me make this clear. We had qualified these people, this panel of juries on Monday before, which there was about a hundred and twenty of them. I called the role; but part of the time when they answered, I didn't even look up, and I hadn't worked with these people long enough to know—

Q Uh-huh.

A —what color they were by name.

Q I'm not even suggesting any impropriety on your part.

A I know, but I—That would clarify that.

Q I understand. I understand that. You remarked to Ted, and please don't take this wrong. I'm just going by what you said. When Mr. Richardson asked you to do

that, you would see what you could do or something like that, but my feet are to the fire now.

A I said I didn't have my feet on the ground yet. I meant that I had to get to work and get fifteen people in here, frankly, regardless of what color they are, because Judge Thompson had ordered fifteen people in two hours.

MR. HADDAD: Okay. I don't have anything else. Senator?

MR. PORTER: (Nods no)

THE COURT: Bea, there are two primary concerns or questions to be dealt with here. One is the propriety or impropriety of Mr. Richardson's phone call to you in its own sake, and that would have to be looked at and dealt with by someone. The other is whether his comments to you, whatever they were, resulted in any effort on your part to provide additional jurors for our trial of any racial basis.

THE WITNESS: No. No. It did not. Again, I say I got fifteen people the quickest way I could. Again, I will say that what he—what had happened, really, I didn't have time for it to enter my mind and pry on my mind because I had to get fifteen people in here regardless of the color, and I might again say I've never—or I might say I've never gone by color. I've just gotten people that I felt were qualified.

THE COURT: Is there anything at all that happened in the jury selection process of this case, including your providing us with jurors from which to make those collections, that was any different because of Mr. Richardson's phone call to you?

THE WITNESS: No, sir.

THE COURT: And may I safely conclude, then, that our jury in this case and all the jurors from whom we had to draw, were provided completely free of any selection effort on your part pursuant to Mr. Richardson's request or otherwise?

THE WITNESS: Right.

THE COURT: Based on race?

THE WITNESS: That's right.

THE COURT: Do you know of anything that has been said or that has been done that would cause anybody to question the truthfulness or accuracy of that answer?

THE WITNESS: As far as my part is concerned, no.

THE COURT: Well, do you know of anything that was said or done—

THE WITNESS: No.

THE COURT: —on anyone's part—

THE WITNESS: No, I do not.

THE COURT: —that would cause that answer to change?

THE WITNESS: No.

THE COURT: Anything else?

MR. PORTER: No, sir.

THE COURT: Thank you, Bea. I'd appreciate it if you would hold this in confidence for the time being.

THE WITNESS: I will do that. Thank you.

THE COURT: Based on what we've heard, and I think we have been obviously heard from everyone who had any knowledge of this at all, it is my belief that the jury in our case and the jury panel from which this present jury was selected was free of any kind of manipulation or selection on the basis of race or anything else irregular or improper. That is my conclusion. It there any challenge to that conclusion?

MR. PORTER: None by us.

MR. HADDAD: Not to the jury, no.

THE COURT: Therefore, I think there is no reason to disrupt the jury deliberation in the trial on the basis of the issue that we're dealing with; and that was my belief initially when I first inquired of Mr. Bonsiero and then of Mrs. Ritter. But I think now all parties have had a full opportunity to inquire, and I'm satisfied, and apparently the defendants are as well, that there is no basis for disrupting this trial.

That leaves, then, the first concern of the phone call from Mr. Richardson to Mrs. Ritter, and frankly, that falls into the category of possible prosecutorial misconduct or some other character of concern that is really outside of this case and outside, I think, of my responsibility in this case, and rests primarily now with Mr. Price and the Department of Justice and to whatever extent that the facts and circumstances suggest.

MR. HADDAD: Sir?

THE COURT: Yes.

MR. HADDAD: I didn't mean to imply that we don't think there was still prosecutorial misconduct in this trial and since this trial is infected, they should be granted a new trial if there is a conviction. We haven't had time to do certain things that we're looking into as well as the motions and memorandums and so forth.

I think our position is that as to the jury, because of this hearing, there is no need to disrupt the jury itself and for them to consider it, but I don't think we could foreclose this issue completely and say that there is not, taking this coupled with other things that has come to our attention, that ought not be amenable to a motion for new trial if there be a conviction and I'm not—I'm again not trying to be argumentative with the Court at all. I don't want the record to think we're waiving something and we consider this matter foreclosed as to this trial. Only as to the jury.

THE COURT: Of course. You have made a record in reference to the exercise of peremptory challenges and even to my excusing one or more jurors for cause in this case, and I understand that you have some objection to that, and I've already evaluated those objections and ruled on them, and they are available to you to reurge on a motion for new trial if there is a conviction and certainly to be reviewed on appeal. My concern, among others, under the circumstances is whether the telephone call resulted in any tainting of our jury panel, and I conclude, and I think you do, that it did not.

Now, if you wish to couple what has happened with your other objections to urge something of that kind on a motion for new trial, of course you're not foreclosed from doing it, but I see no basis on which to interrupt the jury in their deliberations.

MR. HADDAD: The reason we're saying this is obviously if we had known it earlier, well, I don't know if we could have apprised the jury of it, but it certainly would have gone to the scope and character of the type of prosecution that we said was going on in this case. That is, the granting of immunities to witnesses and such, gross deals and all this stuff, as against Ponder and Brown. I think had the jury been apprised of the attempts, I would have called Miss—the lady as a witness in the trial. Absolutely without question, I would have called this lady as a witness in the trial if I had been apprised of that.

I think it goes to the character of the prosecution in this case. We have said and Mr. Richardson said in his final argument, "Do you think the government would do this? Would do that, would do the other thing," and honest to God, Judge, I

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mean, I don't get shocked by anything anymore. I've been around too long, but I really believe that would have had a substantial impact on that jury; and it certainly, while it might not be evidence in the case, it certainly would be evidence of bias and some of these other things that certainly would have shown the character of the prosecution. At least I would have been able to make a record during the trial as to whether that person could have been produced as a witness to show that not only has Mr. Richardson had persons —you know, we have admitted perjurers in this case, we have this, we have that, we have the other thing, and it's been our theory of the defense that these people all sold—testified against these people to save themselves; and just to show the character of the prosecution when Mr. Richardson appears in there and says, "Our govern-

ment wouldn't do this or that or any of the other things," and here is at least the issue raised of whether he contacted the jury selector to deny these defendants--black--their race and a jury of their peers. I think it would have had a substantial impact on a jury.

We've had a jury out now six hours, seven hours deliberating. I think it would have had a substantial impact. It's obvious, because this is a pretty clear-cut case, that they are hung up on something, and something of what we said must have washed; that I think it could have had a substantial beneficial effect upon the defendants to have called this lady as a witness and put this before the jury. I think it could have properly been put before the jury in this case.

MR. PORTER: And if the conduct was improper in that extent before any evidence was taken, then it raises the high possibility that the conduct could have been improper in preparing the case for trial. For example, it was undisputed that Mr. Richardson, the FBI agent, Terry Holley and Mr. Mustin and another person met at the county jail over the weekend and had conversation.

Now, it goes to whether or not the misconduct on the part of--it certainly raises an inference if a prosecution was going to be that bold, that it also could raise the probability that they were bold enough to suggest to witnesses what to say. They visited with these witnesses, they had control of these witnesses, they have made deals with these witnesses, inference as to what to say and what not to say; and so when it comes to misconduct on the part of the prosecutor, the act of even calling that jury clerk was improper on his part.

And in furtherance of Fred's argument, part of his closing argument went to to the very essence, "If you think we've done anything wrong and we've tried to in any kind of way railroad these people to the penitentiary, then turn them loose," but that was part of his argument, knowing full well at the time that that argument was made, that at least he had picked up the telephone and called the clerk, the jury clerk before any evidence

was taken, to try and determine or possibly prohibit a black citizen from serving on the jury.

So it goes to misconduct prior to any evidence, even prior to the jury being selected, and that raises in my mind whether or not misconduct occurred. And I probed extensively on that about your visits with Mr. Richardson, who was present, when they took place, whether or not these witnesses were fudging or shading their testimony or giving their testimony in a light most favorable or suggestionable by the government, from the IRS agent to codefendants and unindicted co-conspirators who were involved in this case. And if that misconduct in fact occurred, there is not any question about it, it certainly occurred prior to the jury being selected.

I cannot conceive that if I had picked up a telephone and called that clerk and said that or even gave that impression to her, I shudder to think, as a defense lawyer, I just shudder to think what would have happened, had either Fred or myself called her and said, "Try to keep any blacks off" or—I mean, "any whites off. How many whites are you going to call? Try to get all black jurors." It goes to the very essence of tampering with the jury even before the jury is selected, and that kind of misconduct causes me, as a defense lawyer, to not believe that perhaps the prosecution in the preparation of this case and the production of their witnesses necessarily acted in all sense of fairness or in all sense of honesty.

And for that reason, I think that even though the jury was not picked as a result of any acceptance of that call, it is to the misconduct of the prosecutor in the case—in the case itself and hinges and taints the whole process of a fair and impartial jury, whether the jurors were twelve white or not and whether he had the ability to influence that or not because very—I don't question that he did not have any ability to choose that jury, but I question his role of misconduct as it relates to what every person is entitled to and that's a fair and impartial trial,

without tainting the trial where one is denied a fair trial.

MR. HADDAD: There is no way we could reopen the evidence and put Mrs. Slater on as a witness?

THE COURT: Not after six or seven hours of deliberation, I think not. But of course, once those issues are raised, the motion for a new trial, if there is a conviction, of course they will be considered.

(Courtroom Deputy Irene Higginbotham hands instrument to the Court)

THE COURT: And it is a very troublesome situation in many ways, and Mr. Richardson's explanation differs from Mrs. Slater's testimony in important ways.

And I'm advised that we do have verdicts on two of the counts, but the jury is not yet able to reach verdicts on the other two counts in a note that I've just been handed, and we'll deal with that in just a moment.

Just to close the record on this, Mr. Richardson, would you care—and I might also say that by letting the trial proceed to verdicts now of course does not foreclose and I did not mean to suggest that it should or would foreclose your raising anything on appeal relating to any of this, in combination or independently; and any such issues would be carefully evaluated if they are so raised. And neither does the concern or the further inquiry about this matter end with the verdict in this case or a ruling on a motion for new trial. It's a concern to all of us and a very unfortunate set of circumstances that I think, in fairness to everyone, needs to be given a full consideration. And just what form that further consideration should take is not clear to me at the moment, but more thought will be given to that.

Mr. Richardson, did you want to say anything further before we close the record on this hearing?

MR. RICHARDSON: Yes, I would like just to make a statement to the Court and to the defendants and of course to Mr. Price that, you know, looking back now,

my God, I regret making that phone call so much, and I don't think that we can avoid the statement that it clearly appears improvident today; and when I first heard, when we sat in there at noon, heard Ms. White read back what Mrs. Slater had said that I had said and what you had summarized, it was very clear that she said and you summarized it, exactly the words, I wrote it down, "Don't get any black jurors," and I was thinking to myself, "My God."

And I wrote it down and gave it to Mr. Price. You know, that's the type of statement that is clearly a crime and just absolutely unacceptable in anybody's book and would be thoroughly improper on behalf of me. I think that what we heard from Mr. Bonsiero and Bea today kind of, I hope, showed what I tried to tell the Court all along was not what I had said.

And from hearing Mr. Bonsiero testify as he recalled it that Bea had said that I said something along the lines, and he was of course just paraphrasing and he didn't hear the conversation, that he recalled her saying that I had said, "We would like to have as few black jurors as possible," which is exactly either I'm sure what I said or close to that, as if, you know, if the entire panel had been there originally, looking back, and I was hoping on the jury panel that heard the case, for the reasons I've stated in Mr. Porter's influence, I was hoping to get as few black of the jurors, not the ones come in but as few jurors as possible, and Mr. Bonsiero I think testified under oath that she said to him that I asked her, "Can you tell me how many blacks are coming in?" And then when Mrs. Slater testified, she said that after she thought about it she said, "Gosh, that appears so improper. I just have to report that to my boss or the Judge," and she did that and there was a question as to whether or not I said, "Don't get any blacks," or whether or not I was asking for a favor like, you know, "Do me a favor, Bea, and exclude people that are black."

And my point is simply this, Your Honor. That of course I didn't do either one. I didn't say, "Don't get any blacks," as if I was big enough to command her to do anything, and her original statement I think to you and to Mr. Bonsiero of that's what I had said, "Don't get any blacks," that's not the type of statement that you make if you're asking for some type of favor, and my point is simply this. That clearly such an improper phone call looking back, even inquiring as to what constituted the panel, I wish had never been made, but I think that the—or it appears obvious to me that the more she thought about it, that it did seem more and more improper, and that it just got blown out of proportion, and it all goes back I think what I told the Court originally before I had heard what she said or before I knew what Frank had said and I was under oath, and I said, "I called her and I remembered the discussions and identified myself and I simply asked Bea, 'Can you tell me how many black jurors are coming in?' "

And you know, I truly regret to both defense attorneys and most importantly to the office of the United States Attorney's office and more importantly to you, making the phone call because I think it appears, the appearance of these anyway is bad; but there was no attempt at all. And I'm saying I guess I'm still under oath, that I never told Bea, "Don't bring in these blacks." That's all I have to say.

THE COURT: My proposed answer to the jury is that they should reach verdicts on all counts and to please continue their deliberations. I think that's the appropriate response at this time. And if they continue to have difficulty, it could be handled a different way. Is that agreeable to both sides?

MR. HADDAD: Yes, sir.

MR. RICHARDSON: Yes, sir.

(Close of requested transcript of proceedings held on June 20, 1984)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 84-2290

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

WILLIE DAVIS BROWN,
a/k/a WILL BROWN, DEFENDANT-APPELLANT

Appeal from the United States District Court
For the Western District of Oklahoma
(D.C. No. CR-84-43-T)

OPINION OF THE COURT

August 20, 1985

Before MOORE, BREITENSTEIN and DOYLE, Circuit Judges

DOYLE, Circuit Judge

Defendant-Appellant Willie Davis Brown here appeals from a conviction in the United States District Court for the Western District of Oklahoma. The charge was conspiracy to violate 21 U.S.C. 841 (a)(1) by possession with intent to distribute marijuana and cocaine. On appeal, defendant contends that:

(1) the district court erred in admitting similar fact evidence of a prior drug arrest under Fed.R.Evid. 404(b);

(2) the prosecutorial misconduct denied him the right to an impartial jury;

(3) the evidence of his participation in the conspiracy was insufficient to support the conviction; and

(4) the government's closing arguments were grounds for a mistrial.

The facts are as follows. The evidence at trial was largely from the testimony of co-conspirators. It established that defendant was the "Florida connection" in a drug distribution operation that transported marijuana from Florida to Oklahoma City, Oklahoma.

On November 24, 1981, police stopped a van and arrested its occupants, Keith Holley, Donald Weber and Terry Holley. They had failed to stop at an agricultural inspection station in the rural Florida countryside. A search of the van by the police produced 170 pounds of marijuana. They found the van to be registered to a co-conspirator, Sam Ponder, who was subsequently arrested. The police then stopped an Oldsmobile automobile that had been following the van. The occupants Greg Holley and Curtis Godwin were arrested after a search disclosed 100 pounds of marijuana. Testimony at trial established that co-conspirators Godwin and Weber had completed a large drug transaction at defendant's home in Florida. Godwin testified that he and Terry Holley bagged 57 pounds of marijuana at defendant's residence.

Further, co-conspirator Michael Mustin testified that he and Terry Holley had purchased 200 pounds of marijuana and half a pound of cocaine for the sum of $100,000 on a previous occasion.

During the trial, the government called Ralph Hernandez, a deputy sheriff from Broward County, Florida. Mr. Hernandez testified that he had arrested defendant on December 5, 1980, for possession of marijuana. The district judge gave the jury a limiting instruction on the

use of this testimony as being solely to establish a plan or motive. Fed.R.Evid. 404(b).

Only the defendant and Samuel Ponder were ultimately tried for the drug conspiracy. Ponder was represented by a prominent member of the Oklahoma State Senate who is a black man. Both the defendant and Ponder are also black. During the jury selection stage, the government excused all black venire members through preemptory challenges. Evidence during the second day of jury selection showed that Mr. Ted Richardson, the prosecutor, told the jury clerk that: "We would like to have as few black jurors as possible." The jury clerk told the district judge in chambers that she was not influenced by Richardson's request. The government preemptorily excused all prospective black jurors.

Defendant was convicted by a jury of the conspiracy on June 20, 1984, and was sentenced to five years imprisonment. He filed a motion for judgment of acquittal or alternatively for a new trial. Both of these were denied. We hold that the district court correctly denied these motions and affirm defendant's conviction.

First, we address defendant's contention that the district court erred in admitting the testimony of Deputy Sheriff Hernandez who had arrested the defendant at a Florida airport in 1980. The Deputy Sheriff testified that he observed the defendant hand over a brown suitcase to a Mr. Banks at the airport. The defendant was arrested after the suitcase was found to contain seventeen pounds of marijuana. The defendant asserts that this previous arrest was inconclusive and prejudiced him. We find no merit in this argument. We conclude that the district judge properly allowed evidence of the arrest to be admitted for propensity purposes. Fed.R.Evid. 404(b) explicitly allows "evidence of other crimes, wrongs or acts for purposes such as proof of motive, opportunity. intent, preparation, plan, knowledge, identity, or absence of mistake or accident." The prior act at issue here was highly probative of defendant's scheme to possess and distribute

marijuana. The Tenth Circuit has long recognized the relevance of previous wrongs and crimes in the context of narcotics violations. We have little difficulty affirming this exception in the circumstances of the present case. *United States v. Nolan*, 551 F.2d 266 (10th Cir.), *cert. denied*, 434 U.S. 904 (1977); *United States v. Leaphant*, 513 F.2d 1184 (10th Cir. 1975); *United States v. Pennick*, 500 F.2d 184 (10th Cir.), *cert. denied*, 419 U.S. 1051 (1974). The district judge eliminated any prejudice to the defendant by a limiting instruction to the jury that the evidence "was not to be considered as proof of the offense at trial, but for the limited purpose of determining motive, intent, knowledge, absence of mistake."

Second, we consider whether the government's use of preemptory challenges to exclude all potential black jurors, combined with the prosecutor's request to the jury clerk concerning the racial composition of the jury, violated the defendant's right to an impartial jury. Twenty years ago in *Swain v. Alabama*, 380 U.S. 202,221 (1965), the Supreme Court held that a violation of a defendant's right to equal protection under the Fourteenth Amendment could not be proved by the mere showing that the prosecutor has struck all black venire members from the jury panel in a single case. This Circuit has previously held that the appropriate analysis for a claim that a defendant's right to an impartial jury has been violated is the framework articulated in *Swain*. *United States v. Jenkins*, 701 F.2d 850, 860 (10th Cir. 1983). This Circuit therefore requires a showing of "systematic and intentional conduct on the part of the Government calculated to exclude Blacks from juries." *Id.* In the present case, there has been no showing that the prosecution was responsible for excluding blacks in "case after case." *Swain*, *supra* at 223. Because the defendant has not met this threshold requirement, we must conclude that he has no valid claim of an unconstitutional use of the preemptory challenge. *Jenkins*, *supra* at 860.

We find no merit in the defendant's argument that communications made by the prosecutor to the jury clerk

on the racial composition of the jury indicated a pattern of systematic exclusion of black jurors. Certainly the action of the government was improper. However, the government's action did not establish a prima facie constitutional violation. The jury clerk disregarded the government's request to limit the number of black venire members, and the government's action had no impact on the possibility that the jury would not represent a cross-section of the community. *See McCray v. Abrams*, 750 F.2d 1113, 1129 (2nd Cir. 1984), *cert. denied*, 105 S.Ct. 2318 (1985). Nevertheless this incident must be condemned even though it did not effect the outcome. The statement made by the district attorney was not shown to have played any part in the selection of the jury. Hence, although this statement was an ignorant one, it was not revealed to the jury and did not play any part in the outcome of the case.

We also find no merit in the defendant's argument that he was prejudiced because the district judge did not inform him of the inappropriate contact made by the prosecution with the jury clerk concerning the race of venire members. Since we concluded that actions did not influence selection of the venire members, we must also conclude that the defendant suffered no prejudice because the district judge did not inform him of the incident.

Third, we consider whether there was sufficient evidence to support defendant's conviction. Such a question is one of fact for the jury to decide. *United States v. Dickey*, 736 F.2d 571, 581 (10th Cir. 1984). *See also United States v. Petersen*, 611 F.2d 1313, 1327 (10th Cir. 1979), *cert. denied*, 447 U.S. 905 (1980); *United States v. Watson*, 594 F.2d 1330, 1340 (10th Cir.), *cert. denied*, 444 U.S. 840 (1979). We must review the jury's decision in the light most favorable to the government, *United States v. Dickey, supra*, at 581; *United States v. Pilling*, 721 F.2d 286, 288-89 (10th Cir. 1983), to determine whether there was sufficient evidence to establish the defendant's participation in the conspiracy.

Our review of the evidence convinces us that the jury properly found that the defendant participated in the drug conspiracy as "the Florida connection." Trial testimony from Godwin and Webber placed defendant at the house where large drug transactions were completed. The other testimony indicates that co-conspirators Mustin and Terry Holley exchanged money for drugs on another occasion. We must conclude that there is an abundance of warranted conclusion that defendant participated in this conspiracy.

Fourth, we consider whether statements made by the prosecution during closing argument were prejudicial to the defendant. We must conclude that none of the statements constitute grounds for a mistrial. We find no errors in the district court's rulings and affirm on all grounds.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
OFFICE OF THE CLERK
C404 United States Courthouse
Denver, Colorado 80294

August 28, 1985

TO: ALL RECIPIENTS OF THE CAPTIONED OPINION

RE: No 84-2290; U.S.A. v. Willie Davis Brown

Opinion filed on August 20, 1985 by Honorable William E. Doyle.

Attached is a corrected page 6 to be substituted for page 6 in the original opinion which was filed on August 20, 1985.

Very truly yours,

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

HKP:kmh
enclosure

[CORRECTED PAGE 6 OF THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT]

No. 84-2290; U.S.A. v. Willie Davis Brown
Opinion filed on August 20, 1985
by Judge William E. Doyle

* * * *

exclusion of black jurors. Certainly the action of the government was improper. However, the government's action did not establish a prima facie constitutional violation. The jury clerk disregarded the government's request to limit the number of black venire members, and the government's action had no impact on the possibility that the jury would not represent a cross-section of the community. *See McCray v. Abrams*, 750 F.2d 1113, 1129 (2nd Cir. 1984), *cert. denied*, 105 S.Ct. 2318 (1985). Nevertheless this incident must be condemned even though it did not effect the outcome. The statement made by the district attorney was not shown to have played any part in the selection of the jury. Hence, although this statement was an ignorant one, it was not revealed to the jury and did not play any part in the outcome of the case.

We also find no merit in the defendant's argument that he was prejudiced because the district judge did not immediately inform him of the inappropriate contact made by the prosecution with the jury clerk concerning the race of venire members. Later the trial judge explained the matter to the jury and did so thoroughly. Since we conclude that the trial court was conscientious and did not influence selection of the venire members, we must also determine that the defendant suffered no prejudice from this source.

Third, we consider whether there was sufficient evidence to support defendant's conviction. Such a question

is one of fact for the jury to decide. *United States v. Dickey*, 736 F.2d 571, 581 (10th Cir. 1984). *See also United States v. Petersen*, 611 F.2d 1313, 1327 (10th Cir. 1979), *cert. denied*, 447 U.S. 905

* * * *

IN THE UNITED STATES COURT OF APPEAL
FOR THE TENTH CIRCUIT

[Title Omitted in Printing]

**PETITION FOR REHEARING
OR TO CERTIFY CONFLICT**

TABLE OF CITATIONS

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McCray v. Adams, 750 F.2d 1113 (2 Cir. 1984)	1
Swain v. Alabama, 380 U.S. 202 (1965)	1
United States v. Jenkins, 701 F.2d 850 (10 Cir. 1983)	1

PETITION FOR REHEARING OR TO CERTIFY CONFLICT

COMES NOW the Appellant aforesaid by the undersigned counsel and makes this, his Petition for Rehearing in the above captioned matter, and states as follows:

FIRST: That this court has affirmed the rulings of the trial Court and in particular as to the prosecutor's exclusion by premptory challenge of "all black venire members" [opinion page 3].

SECOND: That no mention is made, and perhaps this Court overlooked the fact that during the hearing had by the trial Court regarding the prosecutor's remarks that the prosecutor stated under oath that he took into consideration the fact that the Defendants and counsel for one of the Defendant's was black as a result of a prior trial with the black counsel for the co Defendan, and that was his basis for excluding qualified blacks.

THIRD: That the prosecutor thus detailed his reasons for excluding blacks; which Appellant would urge this Court to consider as obviating the *Swain v. Alabama* 380 U.S. 202 (1965) requirement of "systematic and international conduct" [See also *United States v. Jenkins*, 701 F.2d 850 (10 Cir. 1983)].

FOURTH: That while the court has cited to *McCray v. Adams*, 750 F.2d 1113 (2 Cir. 1984), the Appellant respectfully suggests that this Court has created irreconcilable conflict with that circuit in its decisions to recede from the strict requirement of *Swain*, Supra.

FIFTH: That the Appellant would ask this Court to reconsider the fact that as mentioned hereinabove, the prosecutor announced that he excluded premptorily black jurors who stated they could be fair solely on the basis of race, and couple that with the natural inferences of his telephone call to the jury clerk and revisit the opinion authored under the narrow circumstances of this case.

SIXTH: That since the United States Supreme Court denied certiorari in *McCray*, supra, which Appellant respectfully suggests conflicts with the decision of this Court, the Appellant would respectfully request that this Court certify the opinion herein as conflicting therewith to facilitate review of the Constitutional issues involved in this matter.

WHEREFORE, the Appellant moves that an order be entered setting this matter for rehearinng upon the issue raised hereinabove.

SANDSTROM & HADDAD

By: /s/ Fred Haddad
FRED HADDAD

Dated: August 27, 1985

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES COURT
OF APPEALS FOR THE TENTH CIRCUIT

JULY TERM—September 12, 1985

Before Honorable John P. Moore, Honorable Jean S. Breitenstein and Honorable William E. Doyle, Circuit Judges.

[Title Omitted in Printing]

ORDER

This matter comes on for consideration of appellant's petition for rehearing or to certify conflict filed in the captioned cause.

Upon consideration whereof, appellant's, Willie Davis Brown, petition for rehearing or to certify conflict is denied.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

SUPREME COURT OF THE UNITED STATES

No. 85-5731

WILLIE DAVIS BROWN, aka WILL BROWN, PETITIONER

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to the following question: In cases pending on direct appeal, should the holding in *Batson v. Kentucky*, 476 U.S. —— (1986), be given retroactive effect? The case is set for oral argument in tandem with case No. 85-5221, *Griffith* v. *Kentucky*.

June 2, 1986